

COPY

No: 2007-WC-00817-COA

IN THE SUPREME COURT OF MISSISSIPPI

FILED

OCT 24 2007

SAMUEL JAMES

OFFICE OF THE CLERK
SUPREME COURT
COURT OF **Appellant**

v.

BOWATER NEWSPRINT

Appellee

On Appeal from the Grenada County Circuit Court

BRIEF OF APPELLANT, SAMUEL JAMES

Carlos E. Moore, MS Bar No. [REDACTED]
MOORE LAW OFFICE, PLLC
P.O. Box 1402
Grenada, Mississippi 38902-1402
(662) 227-9940

ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS


The undersigned counsel of record stipulates that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of the Court may evaluate possible disqualifications or recusal.


A. Parties:

Appellant:	Samuel James
Appellee:	Bowater Newsprint

B. Attorneys:

For Appellant:	Carlos Moore
For Appellee:	Franklin Williams



Carlos E. Moore, MSB# 

OF COUNSEL:
MOORE LAW OFFICE, PLLC
P.O. BOX 1402
Grenada, MS 38902-1402
662.227.9940

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
Statement of Facts.....	3
SUMMARY OF THE ARGUMENT	5
ARGUMENT.....	6
I. Standard of Review.....	6
II. Applicable Law.....	6
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	11

TABLE OF AUTHORITIES

CASES

<i>Bolivar County Gravel Co. v. Dial,</i> 634 So. 2d 99, 104 (Miss. 1994).....	8
<i>Cooper v. MS Dept. Rehabilitation Services,</i> 937 So. 2d 51- 51 (Miss. App. 2006) ,.....	8
<i>Jenkins v. Ogletree Farm Supply,</i> 291 So. 2d 560, 562 (Miss. 1974).....	8
<i>J.H. Moon & Sons, Inc. v. Johnson,</i> 753 So.2d 445, 446 (Miss. 1999).....	7,8
<i>Pepsi Cola Bottling Co. v. Long,</i> 362. So. 2d.182, 185(Miss.1978).....	1
<i>Quaker Oats Co. v. Miller,</i> 370 So.2d 823, 827 (Miss 1979).....	7
<i>Singer Co. v. Smith,</i> 362 So. 2d 590, 593 (Miss. 1987).....	8, 9
<i>Walker, Inc. v. Gallagher,</i> 926 So. 2d 890, 893 (Miss. 2006).....	6
<i>Wildmon v. City of Booneville,</i> 2007 WL 2839530 (Miss. App., 2007).....	6

STATUTES AND RULES

Miss. Code Ann. § 71-3-35 (1)	1,2,6, 7
Fed. R. Civ. P. Rule 12(b)(6).....	8

STATEMENT OF THE ISSUE

The full commission and trial court erred in affirming the finding of the administrative judge that the claimant's claim was time barred pursuant to Miss. Code Ann. § 71-3-35 (1) when the statute of limitations period begins when "with reasonable care and diligence it is discoverable and apparent" that a compensable, disabling injury exists. *Pepsi Cola Bottling Co. v. Long*, 362 So. 2d 182, 185 (Miss. 1978). Can an employer reasonably deny benefits for an injury that is exacerbated throughout the course of employment and that does not become occupationally disabling until several years after the initial, non-disabling injury occurred?

STATEMENT OF THE CASE

This is a Workers Compensation Case on appeal from an Order of the Circuit Court of Grenada County affirming the Full Commission finding that Samuel James' claim was time barred pursuant to Mississippi Code Annotated § 71-3-35. The full commission found that the claimant's injuries were tied to a previous workplace injury in 1994 and failed to access the proper date of injury. While the initial injury suffered by the claimant occurred on or about August 25, 1994, said injury did not manifest itself into an occupational disabling condition until January 2004. The Mississippi Workers Compensation Commission held that Mr. James' claim was untimely. The Circuit Court affirmed the finding of the Full Commission in the face of clear evidence that the claimant's injuries were exacerbated throughout the course of his employment and failed to manifest as a disabling compensable injury until January 2004, after which time the Petition to Controvert was filed on June 7, 2005.

STATEMENT OF THE FACTS

Mr. James served as an employee of Bowater Newsprint from 1992 until he suffered a disabling injury in January of 2004. Mr. James worked as a line technician for the duration of his employment at Bowater Newsprint, twelve years. While employed at Bowater Newsprint, Mr. James faithfully reported for duty and effectively executed his required tasks and responsibilities. Mr. James suffered a work related injury in 1994, but continued to serve and faithfully perform in spite of his medical condition.

On or about August 25, 1994, Mr. James suffered from a work related injury when he slipped and fell at work. While trying to retrieve oil from the basement, Mr. James inadvertently stepped into a puddle of oil and slipped and sustained an injury that caused initial soreness and pain. Mr. James reported the injury to a supervisor. He was referred to the company nurse, Wanda Pyron, who advised him to take some Advil and soak in hot water. She told him that if the pain continued to bother him she would refer him to a doctor. She referred him to Dr. Kevin Whalley. On or about June 10, 1996, Mr. James had an appointment with Dr. Whalley where he was told that he was developing a medical condition called avascular necrosis in addition to the injury he sustained from work.

Mr. James continued to seek treatment for the injury he sustained and continued to work diligently for Bowater Newsprint under the restrictions allocated by his physicians. Dr. Whalley referred Mr. James to Dr. Windham for further evaluation and diagnostic testing in October of 1996. After several referrals and appointments, Mr. James was told that his avascular necrosis had advanced thus causing his severe hip pain. Mr. James was not aware of the origin of his injury and visited several physicians under the possibility of a back injury. He was not informed

of the severity or progression of his medical condition until surgery was ordered and later conducted in January 2004. Mr. James continued to work throughout the ten years despite the pain he suffered from his initial injury.

Mr. James filed a *Petition to Controvert* on June 7, 2005 asserting that his condition was severely aggravated by performing his professional responsibilities. Bowater Newsprint responded to the Petition by filing a motion to dismiss pursuant to Miss. Code Ann. § 71-3-35(1) for untimely filing of the *Petition to Controvert*. Administrative Judge Virginia W. Mounger granted the motion. Mr. James appealed to the Full Commission and the Administrative decision was upheld by the Full Commission. Mr. James appealed to the Circuit Court of Grenada County, Mississippi. Said court upheld the Full Commission's decision. Mr. James now appeals the earlier judgments.

SUMMARY OF THE ARGUMENT

In this workers compensation claim, the Full Commission and Circuit Court erred in affirming the decision of the Administrative Judge. The Administrative Judge ruled that Mr. James' claim was time barred without accurately accessing the facts pertaining to his injury. While Mr. James sustained an injury in 1994, he received treatment for the injuries incurred at that time. As time progressed however, Mr. James' injuries were exacerbated by his work conditions. While the injury sustained in 1994 exposed Mr. James' health condition, it was not until 2004 that his injuries advanced to a debilitating and occupationally disabling state causing Mr. James to undergo surgery and eliminating his ability to continue working. Nevertheless, Mr. James worked under doctor supervision ten years and it is only plausible that the injuries he sustained to his hip were exacerbated by his continuing hard work and service to Bowater Newsprint. It's unconscionable to allow an employer to capitalize off the efforts of injured employees and fail to acknowledge their role in the progression of a health condition when there is no other legal remedy available besides a workers compensation award.

ARGUMENT

Standard of Review

In matters of statutory interpretation, the Appellate Court applies a de novo standard of review, *Walker, Inc. v. Gallagher*, 926 So. 2d 890, 893 (Miss. 2006). In addition to being a matter of statutory interpretation, the proper standard of review for an appeal following a motion to dismiss is de novo, *Wildmon v. City of Booneville*, 2007 WL 2839530 (Miss. App., 2007). This Court is addressing a question of law and not a question of fact.

Applicable Law

The issue on appeal is whether or not it is inhumane for an employer to acknowledge that an employee suffered an injury on the job, know that the employee in question was seeking medical treatment, and wait for the two year statute to run while reaping the benefits of the employee's continued hard work and service. While Miss. Code Ann. § 71-3-35(1) bars any claim when no application for benefits has been filed within two years after the date of injury if no compensation has been paid other than medical or burial expenses, language in court decisions suggest that assessing the date of injury is a material fact that should be allowed to be developed, therefore the Administrative Judge's decision to dismiss the claim failed to accurately assess Mr. James' date of injury. This failure not only unfairly bars Mr. James' claim, but it failed to allow him to incur any legal remedy for injuries he sustained throughout his course of employment with Bowater Newsprint.

Mr. James' injury was not latent under the standards established by *Quaker Oats Co. v. Miller*, 370 So.2d 823, 827 (Miss 1979); however, his injury degenerated over the duration of his

employment and did not manifest as a debilitating occupational injury until January 2004 when he underwent surgery and could no longer perform his occupational duties. According to the language in the Moon decision, the correct assessment of the time of injury is at the point that the claimant knew that he had sustained a disabling injury. *J.H. Moon & Sons, Inc. v. Johnson*, 753 So.2d 445, 446 (Miss. 1999). Under this analysis, this point was not reached until Mr. James underwent surgery in January of 2004, and Mr. James filed his Petition to Controvert on June 7, 2005, which was well within the two year statute of limitations outlined in Miss. Code Ann. § 71-3-35(1).

The Mississippi Supreme Court held in Moon that punishing an employee economically for an ever-worsening physical condition that is progressive in nature would be inappropriate. *Id.* at 449. In addition the court also reiterated that doubtful cases should be solved in favor of compensation, in order to fulfill the purpose of the statute. *Id.* at 447. Here like the Claimant in Moon, Mr. James' injuries arose from one specific incident that occurred several years prior to the filing of a Petition to Controvert, however, Mr. James sustained no other injuries from 1994 until 2004 so it is reasonable to assess the injury as gradual. Similar to the Claimant in the Moon case, Mr. James condition was progressive in nature and he did not suffer a disabling condition until he was no longer able to work, which was in 2004. According to the language in Moon, the injury is not complete until the Claimant is found to be disabled or suffering from a permanent injury. While, Mr. James was aware of a specific incident his injury did not inhibit his ability to work, or result in a permanent injury until 2004. Holding otherwise would allow employers to benefit financially from the injured laborer's injury and avoid compensation by waiting until the statute has run. This would be contrary to the purpose of the statute and eliminate any legal recourse that workers can initiate against their employers.

Similar to the outcome in Moon, the Mississippi Supreme Court held in the Dial case that a Claimant's occupational disability does not fully manifest itself until the Claimant can no longer perform his or her occupational duties. *Bolivar County Gravel Co. v. Dial*, 634 So. 2d 99, 104 (Miss. 1994). According to this standard, the proper assessment of the date of disabling injury should be found to be at the time that Mr. James could no longer work. The relevant date of injury would commence on January 15, 2004. In support of this argument the Mississippi Supreme Court also held in *Jenkins v. Ogletree Farm Supply*, 291 So. 2d 560, 562 (Miss. 1974), that when a disability is gradual and the result of cumulative exposure rather than from a single event the claim is not time barred. Essentially, Mr. James' circumstances are identical to those made in Moon and Jenkins. Like those Claimants, Mr. James' injuries did not manifest themselves into a disabling condition until several years after the initial injury. Evidence suggests that Mr. James' medical condition deteriorated throughout the course of his employment.

Mr. James' injuries manifested into a disability that prevented further employment. This fact alone distinguishes his claim from others that were barred by the statute of limitations. Unlike the claimant in Cooper, Mr. James' suffers from a permanent disability. Cooper only suffered from a severe allergic reaction and it is arguable that she could still obtain employment away from the chemicals in question. *Cooper v. MS Dept. of Rehabilitation Services et. al.*, 937 So.2d 51- 53 (Miss. App. 2006) This is not the case for Mr. James. His injury now completely impairs his ability to perform several tasks which are essential to the enjoyment of everyday life, such as walking, lifting, driving, climbing, loading, and unloading materials.

In the alternative, Mr. James' claim should correlate with the last injurious exposure rule. In *Singer Co. v. Smith*, 362 So. 2d 590, 593 (Miss. 1987), the Court stated: "the last injurious exposure rule as set forth by Larson, Workmen's Compensation Law 95 (1978) is:

When a disability develops gradually, or when it comes as the result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure is usually liable for the entire compensation.”

Here, in the event that Mr. James’ injury is determined to be time-barred, the facts suggest that he should still be able to raise a claim alleging that January 15, 2004 was the date that he sustained his last injury or aggravation, thus allowing his claim to be heard on its merits.

In addition to the two previous arguments, barring Mr. James’ claim would be a clear violation of public policy which in essence would find that the employee has a duty to pay for injuries sustained throughout the course of employment. Under this analysis, the employee would be punished for following the procedures outlined in the workers compensation process. Here, Mr. James made Bowater Newsprint aware of the injury he sustained in 1994. He continued to work under the restrictions allocated by his physicians until his condition degenerated and resulted in an occupational disability. At this point, he filed a claim. Before January 15, 2004 Mr. James did not have a disabling injury. Affirming the previous decisions of the Full Commission and Grenada County Circuit Court would reward employers by allowing them to work an employee under restrictions until they are disabled and then escape liability by asserting the statute of limitations. How unjust would that be?

CONCLUSION

In the claim at bar, Mr. James' occupational disability was not acknowledged or recognized until January 15, 2004. Shortly after the recognition of his occupational disability, Mr. James filed a Petition to Controvert for the disabling injury he sustained. While Mr. James injury was not latent, it was progressive in nature, which means that the statute would not begin until he suffered an occupational disability from a compensable injury. Therefore, Mr. James' claim is not time barred, and he deserves the facts surrounding his claim to be heard and evaluated. As such, Mr. James respectfully requests this honorable Court to reverse and remand the present case to the Mississippi Workers' Compensation Commission for the evaluation of the facts discussed herein, and a full hearing on the merits.

Respectfully submitted,

SAMUEL JAMES, APPELLANT

BY: Carlos E. Moore
Carlos E. Moore MSB [REDACTED]
Attorney for Appellant

OF COUNSEL:

MOORE LAW OFFICE, PLLC.
1155 Martin Luther King, Jr. Blvd.
P.O. Box 1402
Grenada, MS 38902-1402
662-227-9940

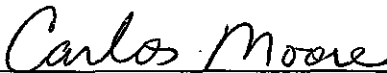
CERTIFICATE OF SERVICE

I, Carlos E. Moore, attorney for the appellant, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the above and forgoing to:

FRANKLIN WILLIAMS, ESQ.
THE WILLIAMS FIRM, PC
1002 Van Buren Ave.
Oxford, MS 38655

Honorable Clarence E. Morgan, III
Circuit Court Judge
P.O. Box 721
Kosciusko, MS 39090-0721

SO CERTIFIED this the 24th day of October, 2007.



CARLOS MOORE